Supreme Court, U.S.
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In the Supreme Court of the United States

No. 71-526.

OCTOBER TERM, 1971.

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SUPREME COURT, U. S.

FLOYD M. FREED III,
Petitioner,

vs.

ERIE LACKAWANNA RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

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NATURE OF THE CASE.

This is a question under the Federal Employers Liability Act, 45 U.S.C. 51, *et seq.*, brought by petitioner Freed, a brakeman for the Erie-Lackawanna, tried to a jury in federal court in Cleveland.

The jury returned a verdict for defendant Railroad.

Judge Kalbfleisch, the trial judge, overruled petitioner's motion for new trial (Petitioner's Brief, pp. 13-17), and the United States Court of Appeals for the Sixth Circuit (Judges Peck, Brooks and Kent) affirmed. 445 F.2d 619 (Petitioner's Brief, pp. 18-21).

THE ACCIDENT.

Petitioner Freed was head brakeman for the crew bringing a mainline freight train into the switching area at North Randall, a suburb of Cleveland (R. 132, 135, 136). The conductor had received permission for the crew to stop at North Randall, leave the train, and go to luncheon at one of the restaurants bordering Ohio Highway 8 at North Randall (R. 55, 56, 112-115).

While the engineer, who was to stay with the train while the others were at luncheon, slowly moved the freight to clear the switches for the switching crew which at that time was engaged in switching operations in the North Randall yards, petitioner Freed and the fireman dropped off the train (R. 54-61, 171, 333, 334). The pair crossed two sets of tracks, and, walking alongside the adjacent sidetrack, started toward the restaurant (R. 54, 60, 61, 139, 295). Petitioner Freed's companion, the fireman, discovered he had left his cigarettes in the cab of the locomotive, and called to the engineer to throw them to him (R. 61). Petitioner Freed stopped to watch the retrieval of the cigarettes, and was somehow struck by the corner of the caboose which the switching crew was slowly backing in carrying on its switching operations (R. 62, 140, 141, 279, 294, 334, 338). For injury so received, petitioner Freed brought suit.

THE RECORD PRESENTS NO QUESTION CALLING FOR REVIEW HERE.

The questions petitioner Freed would present, do not arise on this record.

Evidence concerning the character of the area, and that the operations in North Randall were conducted under yard rules, *was received without objection by petitioner;* both parties recognized that the questions now urged by petitioner, created issues of fact for the jury. They were so argued to the jury. Following the argument, the court charged the jury. No objection was taken by petitioner to the charge, except to a minor point relating to damages—which the jury never reached.

Petitioner, having treated the questions as issues of fact, cannot now construct out of them questions of law.

This is an ordinary jury case, fairly tried to a jury.

CONCLUSION.

The writ should be denied.

Respectfully submitted,

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Of Counsel:
ARTER & HADDEN.